

## TOUR OPERATOR INDUSTRY

This Information Sheet was prepared to clarify the common law factors as they apply to Tour Directors and Tour Guides performing services within the Group Tour Operator Industry. Depending on the method in which they perform their services and the specific terms of the relationship, these workers may perform services as employees or independent contractors. Before making an employment status determination for these workers, it is necessary to define Tour Director and Tour Guide and the two types of travel companies for which they perform services.

**TOUR DIRECTOR:** Travels with tour groups as they move from one location to another.

**TOUR GUIDE:** Provides services while groups are in a specific locale.

**TRAVEL AGENCY:** Establishments primarily engaged in furnishing travel information and acting as agents in arranging tours, transportation, rental of cars, and lodging for travelers.

**TOUR OPERATOR:** Establishments primarily engaged in arranging and assembling package tours for sale through travel agents or directly to travelers.

For example: A group goes to a travel agent and books a three-island tour of Hawaii. This particular tour is one marketed by a tour operator who has made all the arrangements for the tour. Accompanying travelers on the tour is a tour director who will travel with the travelers from the mainland to each of the islands making sure everything runs smoothly. While on the big island of Hawaii, a local tour guide conducts a tour of the island.

Tour guides and tour directors perform their services on behalf of tour operators or travel

agencies. They conduct or lead tours for travelers, sightseers, or vacationers. Their services are performed either as employees or independent contractors. As an employee, a tour guide and tour director performs his/her services under the direction and control of a tour operator or travel agency. If the tour guides and tour directors cannot be directed and controlled by a tour operator or travel agency, and they can establish that they are in business for themselves, the tour guides and tour directors would be considered independent contractors.

### Who is an Employee?

An employer-employee relationship exists when a person who hires an individual to perform services has the right to exercise control over the manner and means by which the individual performs his or her services. In Tieburg v. Unemployment Insurance Appeals Board [(1970) 471 P.2d 975 Cal. 3d 943] the Supreme Court stated, "...the right to control and direct the individual who perform services as to the details and means by which the result is accomplished is the most important consideration but not the only element in determining whether an employment relationship has been created." The court also pointed out that there are secondary factors that must be considered. Based on the above, the court has clearly established that the secondary factors must be considered when making an employment status determination. Therefore, instead of making an employment status determination based on any one single factor, it is based on a multifactor test. For example, take the factor, "Part of Regular Business of Principal." When a worker's services are an integral or normal part of the principal's business activities, that particular factor would be considered indicative of employment.

Although the factor is indicative of employment, that one factor alone will not establish an employment relationship.

### **Determination Factors**

The attached Table of Determination Factors lists 16 factors found in numerous California Unemployment Insurance Appeals Board (CUIAB) cases addressing the status of tour guides. These factors should be used to determine whether or not an employment relationship exists. Along with each factor, the chart lists evidence that indicates

either “employment” or “independent contractor” status. Lastly, each factor has been given a weight based on the importance or significance of the factor as evaluated by the CUIAB.

A grouping of heavily weighted factors indicating employment would normally be considered employment. When the factors appear to be evenly distributed, the law has said the relationship is also employment. If a grouping of heavily weighted factors indicates independence, the individual would be considered an independent contractor for the purposes of the California Unemployment Insurance Code.

Equal Opportunity Employer/Program. Auxiliary services and assistance available to persons with disabilities.
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## TABLE OF DETERMINATION FACTORS

<u>FACTORS</u>	<u>EVIDENCE</u>  EMPLOYEE	<u>OF:</u>  INDEPENDENT CONTRACTOR	<u>WEIGHT</u>
(1) Policies, Rules, or Procedures of Conduct	Set by the principal as evidenced by written or verbal instructions necessary as to the details (manner and means) or methods to conduct a tour. For example, the principal provides a manual for the worker to establish procedures or rules for dealing with various situations when performing services on a tour, such as meeting with customers, topics for discussion, baggage loss or damage, customer complaints, dress code, emergencies, etc.	Worker performs his or her services independent of any policies, rules, or procedures of conduct when performing services on a tour. For example, worker develops own topics for discussion on a tour, determines best method to resolve customer complaints, lost or damaged baggage, develops own procedures in emergency situations, etc.	The setting of policies, rules, procedures, and instructions by the principal is an indication of direction and control over the worker's services and carries great weight.
(2) Supervision on the Job	The worker is subject to supervision from the principal. The principal reviews the work performance as to how the worker conducts himself or herself on the job. For example, the principal's personnel goes along with the worker on a tour to observe the worker's job performance in order to evaluate the worker. During the tour the worker could be required to make changes as instructed by the principal's personnel.	Details (manner and means) of the work are not subject to supervision by principal. The worker is not accompanied on a tour by any of the principal's personnel.	To the extent that the principal exercises control over the work through supervision it is evidence that the principal has the right to control the work, and that this right to control the work is complete and authoritative. This right to control (whether or not exercised) carries the greatest weight in making an employer-employee relationship determination.
(3) Tour/Travel Arrangements	Principal sets price of tour and plans the itinerary, schedules dates and times of accommodations, meals, provides transportation, etc. The worker does not have the discretion to alter the itinerary during the tour without prior permission from the principal.	The worker may modify tour/travel arrangements. The worker has discretion to change the tour itinerary without prior permission from principal in accordance with the principal's contract with the client.	To the extent that the principal exercises control over the details of the work through tour/travel arrangements is evidence that the principal has the right to control the work. This factor carries great weight in making an employer-employee relationship determination. There would be a tendency to show independence if the worker has the discretion to modify the travel arrangements without seeking the permission of the principal.

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(4) Reports	Principal requires worker to submit reports regarding customer's satisfaction, complaints or problems, quality of tour, accommodations, meals, etc.	The principal does not require the worker to complete any reports. For example, at the end of a tour the principal cannot require the worker to survey or obtain a questionnaire from the customers in order to evaluate the customer's satisfaction, or any problems associated with the tour, etc.	Reporting requirements are an extension of the factor "supervision" and would be given medium to great weight depending on the purpose and content of the reports (verbal or written). Reports that are used to monitor the worker's performance are considered controls by the principal over the manner and means of the work.  If a survey or post tour questionnaire is utilized its purpose must be established before it can be determined whether or not the information it contains can be used to exercise control over the worker. For instance, if the purpose of the survey is to require the worker to make changes in the way his/her services are performed, that would be considered exercising control over the worker.
(5) Training	Training is provided or required by the principal. The principal instructs the worker on details of the job, on the policies, rules, or procedures of conduct, etc.	Training is not provided. Attendance at training is not required. Worker is not paid for time at training.	The act of conducting training to give the worker an orientation of the principal's business and products, by itself, is not a strong indication of employment. However, if by intent or fact the purpose of the training is to convey instructions about performing the work, a dress code, customer relations, etc., it infers that the principal has the right to control the services. This would carry great weight.
(6) Meetings	Principal conducts meetings and worker's attendance is required or expected. The worker's time is paid for.	Principal does not hold required meetings. Attendance is not mandatory and nonattendance is viewed without negative consequence. Time at meetings is not paid for or meetings are not held.	The act of holding informational meetings, by itself, is not a strong indication of employment. However, if by intent or fact the purpose of the meeting is to convey policies, rules, procedures, or instructions, it infers that the workers are not in control of their services and are not independent. This would carry great weight.

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(7) Principal and Worker Contract	Agreement between the principal and the worker gives the principal the right to direct and control the manner and means of the work. Agreement contemplates that the worker will perform the services personally.	Agreement forbids principal from directing the worker as to details (manner and means) of the work. Agreement contemplates the worker is an independent contractor.	<p>Terminology used in a written agreement is not conclusive of the relationship, but is evidence of the relationship intended.</p> <p>Written agreements do not necessarily depict the actual practices of the parties in a relationship. The actual practices of the parties in a relationship are more important than the wording of an agreement in making an employer-employee relationship determination.</p> <p>An agreement in which the principal expresses only an interest in the end result and abandons the right to control the details (manner and means) of the work is evidence of independence.</p>
(8) Termination	Both the principal and the worker have the right to terminate the relationship at will without prior notice or without cause and without any further contractual liability (except for work already performed).	By agreement or practice, the principal is required to pay for work not performed, if the principal unilaterally terminates the relationship, other than for cause. The contract makes the worker liable for damages if the worker fails to complete the terms of the contract.	The right to terminate conveys an inherent power of the principal over the worker. The right to terminate at will, without cause, is strong evidence of employment. If the services being performed by the worker are on a continuous basis, rather than sporadic, it would give the appearance of the principal having the right to terminate the services at will by not using the worker's services anymore.

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(9) Engagement in a Distinct Business	<p>The worker does not operate his or her own business. Work performed is a direct and essential part of the principal's business. The worker does not advertise his or her services to the general public as a separate business. The worker performs services under the principal's trade name. The customers purchase the tours through the principal. The worker receives payment for services from the principal whether or not the customer pays. The principal handles the billings and collections. The principal provides insurance coverage. The worker is prohibited to provide services for others while performing services for principal.</p> <p>The principal is responsible to arrange for a substitute, if the worker is unable to complete the tour. The worker does not have an entrepreneurial risk of loss.</p>	<p>The worker operates an independent business separate from that of the principal. The worker advertises under own trade name, has a business license where required, and has an investment in facilities or equipment. The worker provides his or her own insurance coverage or pays for the cost of coverage under principal's insurance plan. The principal does not restrict the worker to sell additional or optional tours to the principal's customers. The worker arranges for his or her own substitute, if he or she is unable to complete tour.</p> <p>The worker is not prohibited by the principal to provide services for others when performing services for the principal. The worker assumes an entrepreneurial risk of loss (i.e., worker does not receive payment for services from the principal if the customer does not pay).</p>	<p>If the worker has established a separate business, distinct from that of the principal, and the work is performed in the furtherance of that separate business, great weight would be given toward independence. If the worker does not have an established separate business, distinct from that of the principal, and the work is performed in the furtherance of the principal's business, great weight would be given towards an employment relationship.</p>
(10) Required Level of Skill of the Worker	<p>Little skill or experience is required. No particular education is needed. Scripts and subjects for discussion are provided by the principal.</p>	<p>The worker provides expertise in language, customs and culture of the area where tour is conducted.</p>	<p>Level of skill, by itself, generally does not weigh heavily toward independence. However, a high level of skill will weight more heavily when combined with other factors such as separate and distinct business. A low level of skill weighs in favor of employment, since as skill level declines, the worker has less room to exercise the discretion necessary for independence.</p>

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(11) Duration of Services	The worker performs services on a continuous basis.	The worker provides services on a sporadic, per job basis.	This factor, by itself, is not controlling. It tends to reflect whether a person is an employee or independent contractor. Independent contractors usually perform work on a job basis for shorter, designated periods of time. Employment is usually of open-ended duration. A long series of short term assignments from a single principal will tend to show continuity and employment.
(12) Whether the Principal or the Worker Supplies the Instrumentalities, Tools and Place of Work	The principal provides the worker with office space, telephone, support services, forms, supplies, business cards, uniforms, and badges, whether or not the worker is on assignment to conduct a tour.	The worker pays for his or her own office, equipment, support services, forms, supplies, business cards, uniforms, and badges.	If the worker has established his or her own office, and pays all the expenses connected with that separate office, there is a strong indication of independence. On the other hand, if the worker generally works out of the principal's office where all necessities are provided and paid for by the principal, then there is a strong indication of an employment relationship.
(13) Custom in Industry and Location	Principals treat their workers as employees.	Workers typically operate their own separately established businesses.	This factor, by itself, is not controlling. This is because each determination must stand on its own facts regarding the principal's right to direct and control. Industry custom merely gives an inference or direction to the determination.
(14) Method of Payment	Payment by time period (hour, week, month, etc.) or piece rate. Payment made at regular intervals. Compensation set by the principal. The principal provides the worker advance payments furnished for services, expenses such as toll fares, parking, admission to exhibits, tips, etc., or expenses are reimbursed. Benefits are furnished at no cost to the worker.	The fees are negotiated per job. The worker may receive advance payments for services provided they are agreed upon based on the contract between the worker and the principal. The worker pays for his or her own expenses. The principal furnishes no benefits to the worker.	This factor, by itself, is not controlling. It is only an indication of the type of relationship. This is because a worker may be paid solely by the job, but the controls are sufficient to create an employer-employee relationship.

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(15) Belief of Parties	Both parties believe the relationship is one of employment.	Both parties agree that the relationship is one of independence.	This factor, by itself, is not controlling. The belief of parties only infers the intent of the relationship.
(16) Part of Regular Business of Principal	The worker's services are an integral or normal part of the principal's business activities. Activities are central to delivering the services provided by the business.	The worker's services are only supportive of the business activities and are not an integral part of the principal's business activities.	This factor is given medium to great weight. The presumption is that if the worker's services are an integral (regular, normal, central) part of the principal's business, then the principal by business necessity needs to maintain control over the worker's services.